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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 524

ARTHUR T. GALT, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ARTHUR T. GALT, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on June 23, 1954.

OPINIONS BELOW

The opinion of the Tax Court (R. 307-334) is reported at 19 T. C. 892.[1] The opinion of the Court of Appeals (*infra*, Appendix A, pp. 17-32) is reported at 216 F. 2d 41.

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[1] Inasmuch as nine additional copies of the record as printed for the use of the Court of Appeals have been filed pursuant to Rule 21(4), the opinion of the Tax Court is not appended to this Petition. Rule 23(1)(i).

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1954 (*infra*, Appendix B, p. 33). A petition for rehearing was denied on October 11, 1954 (*infra*, Appendix C, p. 34). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, where a lessor of real property has irrevocably given to his three adult sons a stated percentage of contingent rentals due under a 20-year lease for its entire term, and has been assessed a gift tax based on the value of the property interest thereby given his sons as of the date of such gift, the donor is thereafter liable for income tax on the amounts of contingent rentals paid to the sons by the lessee.

2. Whether, where a lessor of real property has irrevocably given to his three adult sons a stated percentage of contingent rentals due under a 20-year lease whereby he divests himself of any control over or right to receive such rentals, and pursuant to which as a matter of state law the sons have an enforceable right against the lessee for such rentals during the entire 20-year term, the rentals so received by the sons are taxable to the father as his income.

3. Whether, where the issue is as to the taxability for income tax purposes of a lessor for that portion of unpredictable income from a lease which he has given to his sons, it is immaterial that his gift is irrevocable or that the sons will receive income pursuant thereto over a 20-year term.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in Appendix D, *infra*, pp. 35-37.

STATEMENT

A. *The Basic Facts.* For purposes of this Petition we accept the facts stated in its opinion (Appendix A, *infra*, pp. 18-20) by the court below:

"Petitioner, in 1922, acquired certain real estate (sometimes referred to as the 'Fair Grounds' property), situated near Maywood, Illinois, a suburb of Chicago [R. 308, 83]. From that time until 1946, the property was used for numerous purposes, with the income derived by the taxpayer little, if any, more than sufficient to pay the real estate taxes [R. 308, 85]. In 1939, the property was leased to the Cook County Fair Association which improved the property by construction of a track for harness races and a grandstand and other permanent improvements for the accommodation of spectators [R. 308; R. 85-86, 108-109; Pet. Ex. 4-8, R. 109, 220-224]. This venture was unsuccessful and taxpayer continued to receive little, if any, net income [R. 308; R. 86, 107-108]. In July, 1945, the State of Illinois legalized parimutuel harness racing in Illinois [Laws of Ill., 1945, pp. 56-65; Ill. Rev. Stat. (1953), c. 8, §§ 37s-37s.34] and on February 26, 1946, petitioner entered into a twenty-year lease with Maywood Park Trotting Association, Inc., as lessee (sometimes referred to as Maywood Park) [R. 69-70, 308]. The lease covers fifteen pages of the printed record and contains forty-six sections [R. 10-26].

"At this point, we think it material to relate only a portion of Secs. 1, 2 and 4 [R. 11, 12, 13]. After providing that the lessee was to have and hold the property from January 2, 1946 until the 31st day of December, 1965, Sec. 1 provided that the lessee, in consideration of the demise, covenanted and agreed to pay the lessor as rent for said demised premises the sum of seven hundred thousand dollars ($700,000), at the rate of thirty-five thousand dollars ($35,000) per year, with the first annual rental payable [by] July 1, 1946, and thereafter the annual rental was to be paid in advance on January 2 of each and every

year of the term [R. 11]. This annual rental was characterized as 'the guaranteed fixed rental' [R. 11]. Sec. 2 provided that the lessee, in addition to the guaranteed fixed rental provided in Sec. 1, pay the lessor the following sums:

> " 'One per centum of the First Ten Million ($10,000,000) Dollars wagered on said premises in any one calendar year and * * two per centum on all amounts wagered in excess of Ten Million ($10,000,000) Dollars in any one calendar year.' [R. 12]

"Sec. 4 provided:

> " 'Any sums that may be due under the provisions of Section 2 of this lease shall be paid as follows:
>
> 40% to Arthur T. Galt, Lessor
> 20% to Arthur T. Galt, Jr.
> 20% to Raymond M. Galt
> 20% to William C. Galt
>
> " 'The above persons designated to receive 20% each are sons of the Lessor who have irrevocably been given said interests by the Lessor, Arthur T. Galt, and any sums due them hereunder shall be paid to them by mailing the amount so due to their respective residences.' [R. 13.]

"Arthur T. Galt, Jr., Raymond M. Galt and William C. Galt, named in Sec. 4 of the lease, at the time of its execution were adults [R. 117, 315].[2] On February 26, 1946 (the same date on which the lease was executed), petitioner delivered to each of the three named sons a letter which, after reciting facts with reference to the execution of the lease, stated in part as follows:

> " 'I want each one of you boys to have a part of the proceeds, if any there shall be, from the wagering that the Lessee speculates may take place. I therefore give you each a one-fifth (⅕) interest under the

[2] [The sons having been born in 1912, 1915, and 1917 (R. 117), they were accordingly 34, 31, and 29 years of age when the lease was executed.]

contingent percentage clause of the lease. This gift to each of you is absolute and irrevocable and I have provided in the lease that any sums, when, as and if, they become due, shall be payable to each of you in the amount of 20% directly by the Lessee. I have by proper provision in the lease divested myself of all dominion and control of the amounts if any should become due to the extent of the gift I am hereby giving you and further by this evidence of the gift to you, divest myself of any control or dominion over such amount. * *

" 'You will all know of course, that in making this gift, I am prompted by my love and affection for you. I hope with all my heart that there will be revenue coming and that you may enjoy the share that I have given you in such possible revenue, and take care of it, if the sum coming to you should be enough to provide you with more than a small part of your current living expenses.

" 'I am now in my sixties and never felt better or was in better health in my life than I am at this date, and as I come from a long lived family—my father having died at about ninety-two, I fully expect to live during the entire life of the lease, and share with you the fullest association of our mutual company.

" 'Assuring you of my fondest paternal affection,

Your father

/s/ ARTHUR T. GALT.' [R. 27-29, 71, 313-314.]

"During 1946, the percentage rental provided in Sec. 2 of the lease amounted to $39,873.05, of which $15,949.22 (40%) was paid to petitioner and $7,974.61 (20%) to each of the three sons, as designated in the lease [R. 70, 314-315]. Maywood Park, on October 22, 1946, made payment to each of the sons by its check, in which each was named as payee [R. 315; Pet. Ex. 13-15, R. 169-170, 229-231]. A letter accompanying each check stated that the money thus paid 'is your share under the terms of the lease' [R. 315; Pet. Ex. 12, R. 169, 228; Pet. Ex. 16-17, R. 170, 233-234]. These checks were endorsed by the sons, deposited in their

respective bank accounts and reported in their separate income tax returns as income [R. 70, 315-316]. Petitioner in his federal income tax return for 1946 reported as rental income received from Maywood Park in that year in the amount of $50,949.22 ($35,000, the guaranteed rental, plus $15,949.22, 40% of the percentage rental) [R. 71, 316]. He did not report any of the amounts paid by Maywood Park to his sons [R. 70, 316]."

B. *The Income Tax Issue.* The Commissioner determined a deficiency of $69,622.52 in the petitioner's income tax, resulting in substantial part from inclusion in his income of the aggregate of $23,923.83, received during that year by the sons as rental from Maywood Park (R. 37-46, 316). On petition for redetermination of the deficiencies asserted by the Commissioner (R. 30-65 [Tax Ct. No. 29528]), the Tax Court sustained that part of the income tax deficiency which was based upon taxing to the petitioner the $23,923.83 paid by Maywood Park to the three sons (R. 321-328, 334).[3]

C. *The Gift Tax Issue.* On the gift tax issue, also, we are content to take the facts from the opinion below (*infra*, pp. 20-21):

"Petitioner filed a federal gift tax return for the year 1946, and in a schedule attached showed that on February 26, 1946, he made a gift to his sons of 60% of sums that might become due under the provisions of Sec. 2 of the lease dated February 26, 1946 [R. 319-320; Resp. Ex. B, R. 121, 252-253]. The schedule stated that the percentages to be received by the sons were contingent and uncertain and of no value [R. 320; Resp. Ex. B at R. 253]. Each of the sons filed a donee's information return of gifts which stated that the gifts were received on February 26, 1946, and that they had no value [R. 320; Resp. Ex. B, at R. 254, 256, 258].

[3] Other amounts of income that entered into the deficiency found by the Tax Court were not pressed before the Court of Appeals, see C.A. Op., p. 21, *infra*, and are not in issue now.

"The Commissioner determined a deficiency in petitioner's gift tax for 1946 in the amount of $68,079.00, and in a memorandum attached to his deficiency notice stated:

> " 'The value of 60% of the income under the percentage clause of the twenty year lease with Maywood Park Trotting Association, Inc., given to the donor's three sons is held to be $337,500.00 on the basis of information now of record, or in the alternative the gift to the three sons in 1946 is the 60% of the percentage income, or $23,923.83, the amount paid in to the sons under the lease.' [R. 9, 320.]

"The Commissioner's assertion of a deficiency based upon a valuation of $337,500.00 rested on the premise that petitioner made a gift to his sons on February 26, 1946 (the date of the execution of the lease), but the record contains no information as to the manner or means by which that amount was ascertained other than that stated in the deficiency notice, that it was 'on the basis of information now of record' [R. 9, 320]."

Petitioner commenced a separate proceeding in the Tax Court for a redetermination of the gift tax deficiency asserted by the Commissioner (R. 5-29 [Tax Ct. No. 27844]), and both cases were consolidated for trial and decision (R. 73; C.A. Op., *infra*, pp. 17-18). Then, as the court below said (C.A. Op., *infra*, pp. 21-22; R. 79-80)—

"At the inception of the hearing before the Tax Court, the Commissioner shifted his position on the gift tax issue by disclaiming the theory on which his deficiency had been asserted, that is, that petitioner made a gift to his sons on February 26, 1946, and advancing instead the theory that a gift was made during the year in the amount of $23,923.83." As counsel for the Commissioner said in the Tax Court (R. 98), "the Government's position is that its primary position is repugnant to its income tax position."

Counsel for the petitioner contended before the Tax Court, as petitioner had asserted in his gift tax return, that the gifts were made on February 26, 1946, but con-

ceded that the gifts instead of having no value, had a value of $34,090.00 on that date, and proved that valuation by two expert witnesses (R. 86-107, 174-185, 190-192).

The Tax Court did not undertake to determine when the gift was made or what value it then had, but decided the case on the basis of what the Commissioner was asking for, viz., a tax on a gift in the amount of $23,923.83 (C.A. Op., *infra*, p. 22; R. 328-329), which was less than the sum on which petitioner admitted owing a gift tax.

D. *The Decision of the Court of Appeals.* Petitioner filed a petition for review of the decisions of the Tax Court on both the income tax and gift tax determinations (R. 335-341). The Commissioner filed but subsequently abandoned a cross-petition to review the Tax Court's decision in the gift tax case (R. 345-346; C.A. Op., *infra*, p. 18).

The Court below affirmed the Tax Court on the income tax issue (C.A. Op., *infra*, pp. 23-27, 32; C.A. Judgment, *infra*, p. 33).

On the gift tax issue, the Court of Appeals below reversed, holding that the gift was made on February 26, 1946, and that on the uncontroverted evidence its value at that time was $34,090; the case was remanded to the Tax Court with directions to redetermine petitioner's deficiency on that basis (C.A. Op., *infra*, p. 32; C.A. Judgment, *infra*, p. 33).

A petition for rehearing filed by the taxpayer was denied (*infra*, p. 34); the Commissioner did not question the ruling in any aspect.

REASONS FOR GRANTING THE WRIT

By holding that petitioner is liable for a gift tax on the value of the "property right * * * to receive income" (C.A. Op., *infra*, p. 30) which he conveyed to his sons, and is simultaneously liable for a tax on the income which the sons receive by virtue of that gift, the court below has decided that the owner of a tree who gives away a branch

thereof, paying gift tax on the value of the branch, must still pay income tax on the fruit which grows on that branch. It will occasion no surprise that this self-contradictory result runs counter to numerous decisions of this Court and is in consequence in conflict with rulings in other circuits.

I.A. That the irrevocable assignment of an indefeasible right to receive income over a long period of years divests the assignor of income tax liability on income thereafter accruing to the assignee was, we had supposed, settled by *Blair* v. *Commissioner*, 300 U. S. 5. As Chief Justice Hughes there said for the Court (300 U. S. at 12), "The one who is to receive the income as the owner of the beneficial interest is to pay the tax."

We recognize, of course, the countervailing principle (C.A. Op., *infra*, p. 23) "that one who retains property from which income is produced is obligated to account therefor even though he has assigned it, thereby divesting himself of all control, and even though it is actually received by the assignee and not by him."

But the indicia of ownership plus control that were found wanting in the cases which elucidated what we call the countervailing principle are all present here. Here, unlike *Helvering* v. *Horst*, 311 U. S. 112, 118, there was a gift of income producing property, not merely of income. Here, unlike *Harrison* v. *Schaffner*, 312 U. S. 579, 581-582, the assignor had no actual command over the income in question. Here, unlike *Commissioner* v. *Sunnen*, 333 U. S. 591, 607, the father had lost all power to defeat the sons' receipt of income. In this case, "the unfettered command" (*Corliss* v. *Bowers*, 281 U. S. 376, 378) to which the income was subject was the command of the sons.

The court below (C.A. Op., *infra*, p. 30) recognized that "petitioner's sons as donees at the time of the execution of the lease and assignments acquired a property right, that is, a right to receive income, a right to parti-

cipate in the rental proceeds." This circumstance under the decisions cited would plainly place the present case on the *Blair* side of the hitherto established line; and, since petitioner clearly ceased to be owner of the corpus *pro tanto*, the case would fall outside the rule of *Helvering* v. *Clifford*, 309 U. S. 331, 335. But the court below went on to hold that the income was taxable to petitioner none the less.

Distinction between this case and *Blair* on the ground that no specific conveyance of the corpus was involved in the instant arrangement is not possible. Neither was there any specific conveyance of the corpus in *Blair*. Both here and in the *Blair* case all that was specifically assigned was an irrevocable right to receive income. Here are the relevant excerpts from the two instruments:

BLAIR[4]	GALT[5]
That the said party of the first part, in consideration of love and affection and One Dollar ($1) * * * does hereby sell, assign, transfer, * * * an interest amounting to * * * $6,000 for the remainder of the current calendar year, and * * * $9,000 in each calendar year thereafter in the net income which the said party of the first part now is, or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, Deceased * * * and the said party	Section 4. Any sums that may be due under the provisions of Section 2 of this lease shall be paid as follows: 40% to Arthur T. Galt, Lessor 20% to Arthur T. Galt, Jr. 20% to Raymond M. Galt 20% to William C. Galt The above persons designated to receive 20% each are sons of the Lessor who have irrevocably been given said interest by the Lessor, Arthur T. Galt, and any sums due them here-

[4] *Commissioner of Internal Revenue* v. *Blair*, 83 F. 2d 655, 658, note * * (C.C.A. 7), reversed, 300 U.S. 5.

[5] R. 13.

BLAIR	GALT
of the first part hereby authorizes * * * said party of the second part * * * to receive and receipt to the Trustees under the Will * * * of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will * * *. All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any assignment, nor upon any transfer by operation of law, and shall cease upon the death of either party hereto. * * *	under shall be paid to them by mailing the amount so due to their respective residences. * * *

Very obviously, there is no difference in substance, and hardly any in form, between the two documents. The *Blair* case arose in Illinois and was decided under Illinois law. And in the instant case, as we can demonstrate in brief outline, the sons' property rights as a matter of Illinois law are as clear as the assignees' property rights were in *Blair*.

Rent to accrue is a chattel real (*Dixon* v. *Niccolls*, 39 Ill. 372), and a devise of rents is a devise of the real estate itself (*Mettler* v. *Warner*, 243 Ill. 600, 90 N.E. 1099), so that no part thereof passes to the executor (*In re Estate of Ellsworth*, 310 Ill. App. 223, 33 N. E. 2d 887). Moreover, rents to accrue can be assigned apart from the reversion (*Crosby* v. *Loop*, 13 Ill. 625, 627;

Hefling v. *Van Zandt,* 60 Ill. App. 662, affirmed except as to costs, 162 Ill. 162, 44 N.E. 424; Ill. Rev. Stat. (1953), c. 30, § 2 (*infra,* pp. 36-37)), and the assignee of such rents may maintain an action thereon in his own name (*Wineman* v. *Hughson,* 44 Ill. App. 22; *Barnes* v. *Northern Trust Co.,* 66 Ill. App. 282; Ill. Rev. Stat. (1953), c. 80, § 14 (*infra,* p. 37)). Finally, where, as here, the provision for payment of a portion of the rent to the lessor's sons is included as a part of the lease, the rights of the sons are additionally enforceable on the footing that they inured to a third-party beneficiary, who in Illinois has independent standing to sue on the contract (*Lawrence* v. *Oglesby,* 178 Ill. 122, 52 N. E. 945; *Fleming* v. *Dillon,* 370 Ill. 325, 18 N. E. 2d 910).

Consequently, the court below properly held (C.A. Op., *infra,* p. 30) that the sons acquired a property right, "a right to receive income, a right to participate in the rental proceeds."

B. The ruling below is in square conflict with the decision of the Ninth Circuit in *Hawaiian Trust Co.* v. *Kanne,* 172 F. 2d 74, and with that of the Fifth Circuit in *Farkas* v. *Commissioner,* 170 F. 2d 201. Both involved irrevocable assignments of income which put that income beyond the reach of the assignor.

The court below stated (C.A. Op., *infra,* p. 27) that those cases "are distinguishable on the ground that here there was no assignment of an interest in the property which produced the income or in the lease which provided for its distribution but only an assignment of income." But thereafter the court below went on to say (C.A. Op., *infra,* p. 30), speaking of the present case, "We think it is hardly open to dispute but that petitioner's sons as donees at the time of the execution of the lease and assignments acquired a property right, that is, a right to receive income, a right to participate in the rental proceeds."

Thus, actually, this case is distinguishable from *Hawaiian Trust* and *Farkas* only in the Pickwickian sense that while

the decisions there were in favor of the several taxpayers, the ruling here upheld the Commissioner.

C. The tax here in question was imposed pursuant to Sec. 22(a) of the Internal Revenue Code of 1939. The corresponding provision of the Internal Revenue Code of 1954 is Sec. 61(a). As we point out in more detail in Appendix E, *infra*, pp. 38 *et seq.*, there is no change in substance so far as the present case is concerned.

II. The court below said that "it is immaterial whether the assignment here was revocable or irrevocable, or whether it is for a short or long term" (C.A. Op., *infra*, p. 27; see also *infra*, pp. 23, 29).

We think it plain that this approach ignores the very distinctions which this Court has held controlling in many cases. E.g., *Helvering* v. *Clifford*, 309 U. S. 331; *Commissioner* v. *Sunnen*, 333 U. S. 591. These distinctions are supplementary to the one already canvassed, viz., between a gift of income and a gift of income-producing property. But there will be time for more detailed discussion if this case is heard on the merits.

III. The disregard by the court below of settled principles is highlighted by the gift tax aspect of its decision.

As we have shown, *supra*, p. 7, before the Tax Court the Commissioner disclaimed the basis on which the gift tax deficiency had been asserted, viz., that petitioner had made a gift to his sons on February 26, 1946, saying (R. 98), "the Government's position is that its primary position is repugnant to its income tax position." Accordingly, the Commissioner proceeded on the footing that a gift was made during the calendar year after the date of the lease in the amount of the rentals actually received by the sons during that particular calendar year (R. 79-80).

Petitioner changed the position taken in his gift tax return only to the extent of admitting that the gift had value, and, despite considerable difficulty in convincing the Judge of the Tax Court who heard the evidence that such

value was relevant (R. 86-107), eventually proved that the fair market value of the gift when made was $34,090 (R. 174-185, 190-192).

As we have also shown, the Tax Court held that, since the Commissioner ultimately claimed only a deficiency based on the amount of the income actually received by the sons from Maywood Park during the year, viz., $23,923.83 received in October, the deficiency should be measured by the latter amount, and the Tax Court did not determine the value of the gift when made on February 26, 1946 (*supra*, p. 8; R. 328-329).

It cannot be disputed that, as the court below said (C.A. Op., *infra*, p. 22), "the Tax Court's decision must rest upon the implied finding that the gifts were made on October 22, 1946"—the date the lessee paid the income to the sons (R. 315; Pet. Ex. 12-13, R. 169, 228-229; Pet. Ex. 14-17, R. 170, 230-234). Therefore, again to quote from the opinion below (C.A. Op., *infra*, p. 29),

> "While the [Tax] court did not expressly so state, it is implicit in its holding that petitioner would be liable each succeeding year for a gift tax upon amounts paid to his sons under the terms of the lease. In fact, that was respondent's contention before the Tax Court, as shown * * * from the opinion of the Tax Court, wherein it is stated that respondent 'assumed the basic position that petitioner made gifts to his sons each year as, and in the amounts that, the rentals were paid to them year by year.'[6] This incongruous result would be in prospect notwithstanding the fact that petitioner committed no affirmative act with reference to payments to his sons other than that performed on February 26, 1946, when the assignments were made."

Petitioner is in complete accord with the Court of Appeals' holding that he made a present gift to his sons on February 26, 1946, since on that day he lost economic

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[6] See also the Tax Court's "finding" (R. 320) that "The amounts of $7,974.61 constituted gifts by petitioner during 1946 to each of his three sons."

control over the portion of the rental income which he irrevocably gave to his sons under the terms of the lease. The result cannot be otherwise under the statute (Sec. 1000(a), 1000(b), 1939 IRC [*infra*, pp. 35-36]), the regulation (Treas. Reg. 108, § 86.2 [*infra*, p. 36]), or the decisions (*Burnet* v. *Guggenheim*, 288 U. S. 280; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39; *Smith* v. *Shaughnessy*, 318 U. S. 176; *Robinette* v. *Helvering*, 318 U. S. 184).

Petitioner is likewise in complete accord with the Court of Appeals' characterization of the subject-matter of the gift (C.A. Op., *infra*, p. 30) "as a property right, that is, a right to receive income, a right to participate in the rental proceeds." As a matter of Illinois law (*supra*, pp. 11-12), no other conclusion is possible.

Where we part company with the court below is on its further holding, that the petitioner must pay an income tax on the income received by his sons as a consequence of the gift already taxed. Such a holding is, as the Commissioner recognized (R. 98), "repugnant" to the gift tax ruling. For that holding means, in graphic terms, that where the owner of the tree gives away a branch, and is held liable for a gift tax computed on the value of the branch, he is nevertheless also liable for income tax on the fruit thereafter received from that branch.

A result so inherently self-contradictory involves such thoroughgoing disregard of principles heretofore established by this Court as to call for review of the ruling below.[7]

B. In this instance, also, the enactment of the Internal Revenue Code of 1954 has effected no changes; Sections 1000(a) and 1000(b) of the 1939 Code have their counter-

[7] If the decision of the Court of Appeals is to stand, then there are also raised innumerable doubts of the income-taxability of petitioner's successor in interest if the petitioner dies or otherwise transfers his reversion in the leased property, as well as doubts respecting the income-taxability of the sons on the rents now receivable by them or hereafter received by their successors in the event they die or otherwise transfer their rights to the receipt of these rents.

parts without change of substance here material in Sections 2501(a) and 2511(a) of the later revision. The details are set forth in Appendix E, *infra*, pp. 38 *et seq.*

CONCLUSION

The ruling below injects uncertainty and inconsistencies into the tax system. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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JANUARY 1955.

APPENDIX

APPENDIX A

Opinion Below

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 10987, 11001. OCTOBER TERM, 1953, APRIL SESSION, 1954.

ARTHUR T. GALT, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Petition for Review of Decision of the Tax Court of the United States.

June 23, 1954.

Before MAJOR, *Chief Judge,* DUFFY and SCHNACKENBERG, *Circuit Judges.*

MAJOR, *Chief Judge.* Arthur T. Galt, petitioner (sometimes referred to as the taxpayer), petitions for a review of two separate decisions of the Tax Court, entered May 22, 1953, in which it was decided in Tax Court Docket No. 27,844 that there was a deficiency in petitioner's gift tax for the year 1946, in the amount of $768.84, and in Tax Court Docket No. 29,528 that there was a deficiency in petitioner's income tax for the same year in the amount of $68,318.17. Respondent, Commissioner of Internal Revenue, had asserted a deficiency in gift taxes for the year 1946 in the amount of $68,079.00, and a deficiency in income taxes in the amount of $69,622.52. Petitioner sought from the Tax Court a redetermination of the deficiencies asserted by the Commissioner, which resulted in the aforesaid decisions by the Tax Court. The two proceedings were consolidated for hearing before the Tax Court and they are

presented likewise here. Respondent has abandoned a cross-petition to review the Tax Court's decision in the gift tax case.

Preliminary to a statement of the contested issues, we think it appropriate to make a statement of the facts, about which there is little, if any, dispute and, in the view which we take of the legal issues presented, as subsequently disclosed, we think this statement may be brief as compared to the extensive findings entered by the Tax Court.

Petitioner, in 1922, acquired certain real estate (sometimes referred to as the "Fair Grounds" property), situated near Maywood, Illinois, a suburb of Chicago. From that time until 1946, the property was used for numerous purposes, with the income derived by the taxpayer little, if any, more than sufficient to pay the real estate taxes. In 1939, the property was leased to the Cook County Fair Association which improved the property by the construction of a track for harness races and a grandstand and other permanent improvements for the accommodation of spectators. This venture was unsuccessful and taxpayer continued to receive little, if any, net income. In July, 1945, the State of Illinois legalized parimutuel harness racing in Illinois and on February 26, 1946, petitioner entered into a twenty-year lease with Maywood Park Trotting Association, Inc., as lessee (sometimes referred to as Maywood Park). The lease covers fifteen pages of the printed record and contains forty-six sections.

At this point, we think it material to relate only a portion of Secs. 1, 2 and 4. After providing that the lessee was to have and hold the property from January 2, 1946 until the 31st day of December, 1965, Sec. 1 provided that the lessee, in consideration of the demise, covenanted and agreed to pay the lessor as rent for said demised premises the sum of seven hundred thousand dollars ($700,000), at the rate of thirty-five thousand dollars ($35,000) per year, with the first annual rental payable July 1, 1946, and thereafter the annual rental was to be paid in advance on January 2 of each and every year of the term of the lease. This annual rental was characterized as "the guaranteed fixed rental." Sec. 2 provided that the lessee, in addition to the guaranteed fixed rental provided in Sec. 1, pay the lessor the following sums:

> "One per centum of the First Ten Million ($10,000,000) Dollars wagered on said premises in any one

calendar year and * * two per centum on all amounts wagered in excess of Ten Million ($10,000,000) Dollars in any one calendar year."

Sec. 4 provided:

"Any sums that may be due under the provisions of Section 2 of this lease shall be paid as follows:

40% to Arthur T. Galt, Lessor
20% to Arthur T. Galt, Jr.
20% to Raymond M. Galt
20% to William C. Galt

"The above persons designated to receive 20% each are sons of the Lessor who have irrevocably been given said interests by the Lessor, Arthur T. Galt, and any sums due them hereunder shall be paid to them by mailing the amount so due to their respective residences."

Arthur T. Galt, Jr., Raymond M. Galt and William C. Galt, named in Sec. 4 of the lease, at the time of its execution were adults. On February 26, 1946 (the same date on which the lease was executed), petitioner delivered to each of the three named sons a letter which, after reciting facts with reference to the execution of the lease, stated in part as follows:

"I want each one of you boys to have a part of the proceeds, if any there shall be, from the wagering that the Lessee speculates may take place. I therefore give you each a one-fifth (1/5) interest under the contingent percentage clause of the lease. This gift to each of you is absolute and irrevocable and I have provided in the lease that any sums, when, as and if, they become due, shall be payable to each of you in the amount of 20% directly by the Lessee. I have by proper provision in the lease divested myself of all dominion and control of the amounts if any should become due to the extent of the gift I am hereby giving you and further by this evidence of the gift to you, divest myself of any control or dominion over such amount. * *

"You will all know, of course, that in making this gift, I am prompted by my love and affection for you.

I hope with all my heart that there will be revenue coming and that you may enjoy the share that I have given you in such possible revenue, and take care of it, if the sum coming to you should be enough to provide you with more than a small part of your current living expenses.

"I am now in my sixties and never felt better or was in better health in my life than I am at this date, and as I come from a long lived family—my father having died at about ninety-two, I fully expect to live during the entire life of the lease, and share with you the fullest association of our mutual company.

"Assuring you of my fondest paternal affection,

Your father,

/s/ Arthur T. Galt."

During 1946, the percentage rental provided in Sec. 2 of the lease amounted to $39,873.05, of which $15,949.22 (40%) was paid to petitioner and $7,974.61 (20%) to each of the three sons, as designated in the lease. Maywood Park, on October 22, 1946, made payment to each of the sons by its check, in which each was named as payee. A letter accompanying each check stated that the money thus paid "is your share under the terms of the lease." These checks were endorsed by the sons, deposited in their respective bank accounts and reported in their separate income tax returns as income. Petitioner in his federal income tax return for 1946 reported as rental income received from Maywood Park in that year in the amount of $50,949.22 ($35,000, the guaranteed rental, plus $15,949.22, 40% of the percentage rental). He did not report any of the amounts paid by Maywood Park to his sons.

As noted, the Commissioner determined a deficiency of $69,622.52 in taxpayer's income tax for 1946, which resulted in part from inclusion in his income of the aggregate of $23,923.83, received during that year by the sons as rental from Maywood Park. The Tax Court reduced the deficiency to $68,318.17, which also resulted in part from inclusion in petitioner's income of the amounts thus received by the sons.

Petitioner filed a federal gift tax return for the year 1946, and in a schedule attached showed that on February 26, 1946, he made a gift to his sons of 60% of sums that

might become due under the provisions of Sec. 2 of the lease dated February 26, 1946. The schedule stated that the percentages to be received by the sons were contingent and uncertain and of no value. Each of the sons filed a donee's information return of gifts which stated that the gifts were received on February 26, 1946, and that they had no value.

The Commissioner determined a deficiency in petitioner's gift tax for 1946 in the amount of $68,079.00, and in a memorandum attached to his deficiency notice stated:

> "The value of 60% of the income under the percentage clause of the twenty year lease with Maywood Park Trotting Association, Inc., given to the donor's three sons is held to be $37,500.00 on the basis of information now of record, or in the alternative the gift to the three sons in 1946 is the 60% of the percentage income, or $23,923.83, the amount paid in to the sons under the lease."

The Commissioner's assertion of a deficiency based upon a valuation of $337,500.00 rested on the premise that petitioner made a gift to his sons on February 26, 1946 (the date of the execution of the lease), but the record contains no information as to the manner or means by which that amount was ascertained other than that stated in the deficiency notice, that it was "on the basis of information now of record."

The Tax Court sustained the income tax deficiency asserted by the Commissioner by including, as did the Commissioner, in petitioner's income for 1946 the sum of $23,923.83, paid by Maywood Park to the three sons. (Other amounts of income which enter into the deficiency found by the Tax Court are not here involved.) Thus, one of the contested issues is whether the Tax Court correctly decided that the rental payments made by Maywood Park to the three sons in the year 1946 were includible in petitioner's income for that year.

At the inception of the hearing before the Tax Court, the Commissioner shifted his position on the gift tax issue by disclaiming the theory on which his deficiency had been asserted, that is, that petitioner made a gift to his sons on February 26, 1946, and advancing instead the theory that

a gift was made during the year in the amount of $23,923.83. The Tax Court embraced this theory in its decision and found that petitioner made gifts to his sons during the year 1946, without finding the date on which the gifts were made. While not expressly stated, it is evident that the Tax Court's decision must rest upon the implied finding that the gifts were made on October 22, 1946. Petitioner before the Tax Court also shifted his position, not upon the crucial issue as to when gifts were made to his sons but upon their value. As already noted, in his gift tax return he asserted that the gifts were made on February 26, 1946, and that they had no value. At the hearing before the Tax Court, he still maintained that they were made on that date but contended that they had a value, in fact, proved by two expert witnesses that their value on that date was $34,090.00. Thus, there is no contested issue over the fact that petitioner made a gift to his sons during the year 1946. The controversy now is whether the Tax Court correctly refused to decide that petitioner made gifts to his sons on February 26, 1946, and to determine the value of the gifts as of that date. Or, conversely, did the Tax Court correctly decide that petitioner made gifts to his sons in 1946, without determining the date of such gifts, although presumably they were found to have been made on October 22, 1946, with a value in the exact amount as was paid to the sons by Maywood Park on that date?

There seems to be prevalent in the case the idea that one party or the other will obtain an advantage, depending on which issue is first decided. Petitioner in his brief considers the gift tax issue first and urges the court to do likewise. This apparently is on the theory that a favorable decision on that issue would require a favorable decision on the income tax issue because it is argued that if petitioner made a gift to the sons on February 26, 1946, there could be no basis for including in petitioner's income the payments received by the sons as the result of such gifts. On the other hand, the Commissioner appears to desire a decision on the income tax issue first, apparently on the theory that if that issue is decided favorably to him, it would be repugnant to hold that petitioner made gifts on February 26, 1946.

In our view, this notion apparently indulged in by both parties has no basis in law or in fact. True, it has been held that the gift tax is supplementary to the estate tax, the

two are in pari materia and must be construed together. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39. See also *Smith* v. *Shaughnessy*, 318 U. S. 176. There is no such relation, however, between a gift and an income tax. They are separate and distinct proceedings and neither is dependent upon the other as the basis for the imposition of a tax. And we think much of the confusion with which we are now confronted would not have existed if the proceedings had been tried and decided separately; it arises because the two proceedings were consolidated and presented together.

We shall, therefore, proceed as did the Tax Court and decide the income tax issue first. Before doing so, however, we note that there is a contrariety of opinion as to whether the asserted gifts made by petitioner were irrevocable and, if not, what, if any, power petitioner retained to command or control the receipt of rentals by his sons. It must be true that petitioner intended to make the asserted gifts irrevocable because he so stated both in the lease and in the letters to his sons. On the other hand, numerous provisions of the lease are cited by respondent, which it is urged require a contrary holding. We think this discussion can be laid aside as immaterial to the income tax issue and that it need not be considered in connection with the gift tax issue because there is no dispute between the parties that a gift was made. It is so asserted by respondent and found by the Tax Court, and it is conceded by petitioner. The sole controversy on this issue, as noted, is as to when the gift was made and of what is consisted.

We think the income tax issue was correctly decided by the Tax Court because it is supported by the principle announced in many cases, which in substance is that one who retains property from which income is produced is obligated to account therefor even though he has assigned it, thereby divesting himself of all control, and even though it is actually received by the assignee and not by him.

In *Lucas* v. *Earl*, 281 U. S. 111, a husband assigned a portion of his salary and earnings to his wife, which was paid to her pursuant to the terms of a written contract. In holding that the income thus paid to her was chargeable to the husband, the court, in discussing the pertinent provision of the Revenue Act, stated (page 115):

> "That seems to us the import of the statute before us and we think that no distinction can be taken ac-

cording to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew."

The tree which produced the fruit in the instant case was the property, owned by petitioner after the execution of the lease as it had been before. The lease merely evidenced the manner in which the fruit from the tree should be distributed. Of course, by execution of the lease, petitioner's property rights were diminished to the extent that they were acquired by the lessee but no interest in the property or in the lease was transferred to the sons other than the right to receive income, the fruit from the tree.

A more pertinent case is *Helvering* v. *Horst,* 311 U. S. 112. There, a father, during the taxable years of 1934 and 1935, detached from negotiable bonds negotiable interest coupons and delivered them as a gift to his son. The coupons matured subsequent to delivery but during the same year. (The face value of the coupons delivered during each of the taxable years was $25,182.50.) The Supreme Court held that the coupons when collected by the son were income of the father and reversed the Court of Appeals for the Second Circuit, which had held to the contrary. The Court of Appeals decision (*Horst* v. *Commissioner,* 107 F. 2d 906) is pertinent because its reasoning closely parallels petitioner's contention here. That court stated (page 907):

> "When the petitioner detached the coupons and handed them over to his son as a gift, the son acquired full title and dominion. The petitioner could not interfere in any way with the donee's control and right to receive the money when the coupons matured. Taxwise, the transaction was an outright assignment of future income from property, with the assignee the owner of the income prior to and at its realization."

The Supreme Court rejected this reasoning and, after referring to many cases, stated (page 116):

> "Underlying the reasoning in these cases is the thought that income is 'realized' by the assignor because he, who owns or controls the source of the income, also controls the disposition of that which he could have received himself and diverts the payment from himself to others as the means of procuring the satis-

faction of his wants. The taxpayer has equally enjoyed the fruits of his labor or investment and obtained the satisfaction of his desires whether he collects and uses the income to procure those satisfactions, or whether he disposes of his right to collect it as the means of procuring them."

The court also stated (page 118):

"The power to dispose of income is the equivalent of ownership of it. The exercise of that power to procure the payment of income to another is the enjoyment, and hence the realization, of the income by him who exercises it."

In the same volume and immediately following the Horst case is *Helvering* v. *Eubank,* (311 U. S. 122). In that case, a life insurance agent in 1924 and 1928 made assignments of commissions to become payable to him in the future. The commissions were paid to the assignee in 1933. Held that the commissions thus paid to the assignee in 1933 were includible in the assignor's income for that year.

Petitioner attempts to distinguish the Horst case because there the taxpayer by the assignment of the coupons before maturity deprived himself of income only for two years, while in the instant case petitioner deprived himself of income for twenty years. There is nothing in the court's opinion, however, to indicate that its decision would have been different had the assignment been for a longer term.

Thus, whether the income disposed of by gift be derived from the services rendered by the husband as in the Earl case, or whether it be interest on property as in the Horst case, or whether it be the assignment of commissions to become payable in the future as in the Eubank case, it is chargeable as income to the donor. The crucial question is, did the donor retain control or ownership of the source from which the income was produced? Another pertinent observation may be made of these three cases, that is, that in the Earl and Eubank cases the gifts were revocable while in the Horst case it was irrevocable.

The court in *Harrison* v. *Schaffner,* 312 U. S. 579, in discussing the Horst and Eubank cases, stated (page 580):

"Decision in these cases was rested on the principle that the power to dispose of income is the equivalent of

> ownership of it and that the exercise of the power to procure its payment to another, whether to pay a debt or to make a gift, is within the reach of the statute taxing income 'derived from any source whatever.' In the light of our opinions in these cases the narrow question presented by this record is whether it makes any difference in the application of the taxing statute that the gift is accomplished by the anticipatory assignment of trust income rather than of interest, dividends, rents and the like which are payable to the donor."

It is suggested here that the rents payable to the sons were not and could not be paid to the donor. The point is, however, that petitioner as the owner of the property was entitled to all the income it produced and that he exercised his inherent power to provide that a portion of it be paid to his sons as a gift.

In *Commissioner* v. *Sunnen*, 333 U. S. 591, the court stated as to the Horst case (page 605):

> "Moreover, the Horst case recognizes that the assignor may realize income if he controls the disposition of that which he could have received himself and diverts payment from himself to the assignee as a means of procuring the satisfaction of his wants, the receipt of income by the assignee merely being the fruition of the assignor's economic gain."

And on the following page, it stated as to the Schaffner case:

> "In *Harrison* v. *Schaffner, supra*, 582, it was again emphasized that 'one vested with the right to receive income did not escape the tax by any kind of anticipatory arrangement, however skillfully devised, by which he procures payment of it to another, since, by the exercise of his power to command the income, he enjoys the benefit of the income on which the tax is laid.'"

Petitioner places great reliance upon *Blair* v. *Commissioner*, 300 U. S. 5. That case was aptly distinguished by the Tax Court, which stated:

> "*Blair* v. *Commissioner, supra*, is grounded on the very aspect of such a transaction which is absent here.

> That taxpayer's interest consisted solely of an equitable title which the court considered to be transferred pro tanto when the rights to the income from it were assigned. 'In the circumstances of that case, the right to income from the trust property was thought to be so identified with the equitable ownership of the property, from which alone the beneficiary derived his right to receive the income and his power to command the disposition of it, that a gift of the income by the beneficiary became effective only as a gift of his ownership of the property producing it. Since the gift was deemed to be a gift of the property, the income from it was held to be the income of the owner of the property, who was the donee * *.' *Helvering* v. *Horst, supra.*"

For a further distinction of the Blair case see *Helvering* v. *Horst*, 311 U. S. 112, 118.

Petitioner also relies upon *Farkas* v. *Commissioner*, 170 F. 2d 201 (Fifth Circuit) and *Hawaiian Trust Co., Limited* v. *Kanne*, 172 F. 2d 74. In both of those cases there was an assignment not only of income but an interest in the property from which the income was produced. They both follow the decision in the Blair case, reach the same result and for the same reason. The cases thus relied upon by the petitioner are distinguishable on the ground that here there was no assignment of an interest in the property which produced the income or in the lease which provided for its distribution but only an assignment of income. In those cases the assignor had nothing left after the assignment; here he had everything except the portion of the income assigned. Petitioner cites no case and we know of none where it has been held that a property owner can escape accounting for the income produced therefrom merely by assignment of such income as a gift. And, as stated before, we think it is immaterial whether the assignment is revocable or irrevocable, or whether it is for a short or long term.

We have heretofore set forth the position which the parties originally took with reference to the gift tax issue. The Tax Court, after setting forth the facts relevant thereto, in its opinion stated:

> "At the trial he [Commissioner] stated that he no longer contended that petitioner's gifts were made at the time of the assignment; as to that contention he

conceded error, and he assumed the basic position that petitioner made gifts to his sons each year as, and in the amounts that, the rentals were paid to them year by year. Respondent now must be taken to admit, therefore, that a gift tax deficiency for 1946 in the amount of $68,079 is excessive, and that a deficiency is owing for that year only to the extent of the tax due on gifts valued at $23,923.83. * * * On the other side, petitioner now insists that gifts were made in 1946, and that they were made once and for all when the sons were given an interest in the rents; that the gifts, as then made, can be valued and that their total value was $54,090; and that petitioner owes a gift tax for 1946 based on that valuation."

The Tax Court then proceeds to decide the issue as follows:

"Because of the concessions of the parties, and because only the year 1946 is before us in this proceeding, it becomes unnecessary to consider when, and of what value, the gift was made. Respondent now seeks a gift tax for 1946 based on a maximum valuation of $23,923.83. That is all the Government is asking for, and it is therefore not entitled to an award in a greater amount. Accordingly, since petitioner admits that he owes a gift tax based upon a gift of $34,090, and since respondent now claims to be entitled only to a tax based upon a gift in the amount of $23,923.83, we must hold that the latter amount is the measure of petitioner's gift tax liability for 1946."

No case is cited either by the Tax Court in its opinion or by respondent in his brief in support of the result reached on this issue. The Commissioner concludes his argument, attempting to justify his shift in position, with the following statement:

"The significant thing in this case is that the Commissioner, when the controversy as to the two taxes finally reached trial before the Tax Court, upon a re-examination of his position, then determined to adhere to the position which seemed to him proper, namely to assert that the taxpayer was liable for an income tax upon the amounts paid to the sons in 1946 because that constituted taxable income to him and to assert that the

taxpayer was liable for a gift tax for 1946 to the extent of the amounts paid to the sons in that year."

It is argued that the taxpayer has not been harmed inasmuch as he conceded that a gift was made in 1946 of a value greater than that claimed by respondent and that appears to have been the basis for the Tax Court's decision. We assume that ordinarily a party is in no position to complain where he is required by judgment or otherwise to pay a sum of money less than he admittedly owes. But there is more than that involved in this situation and the holding of the Tax Court overlooks the plain realities of the situation. While the court did not expressly so state, it is implicit in its holding that petitioner would be liable each succeeding year for a gift tax upon amounts paid to his sons under the terms of the lease. In fact, that was respondent's contention before the Tax Court, as shown in the quotation first above made from the opinion of the Tax Court, wherein it is stated that respondent "assumed the basic position that petitioner made gifts to his sons each year as, and in the amounts that, the rentals were paid to them year by year." This incongruous result would be in prospect notwithstanding the fact that petitioner committed no affirmative act with reference to payments to his sons other than that performed on February 26, 1946, when the assignments were made.

We think petitioner was entitled to a decision on his contention that a gift was made on February 26, 1946, a position which he maintained from the beginning to the present, in which the respondent originally acquiesced and a position upon which his deficiency was asserted. In view of that contention by petitioner, we think it unnecessary to determine whether a completed gift was made at that time or any other, which eliminates the necessity for any consideration as to whether the gift was irrevocable. It appears to be the position of respondent that a holding that the gift was made at the time of the execution of the lease would be inconsistent with the decision that petitioner received income when payments were made to his sons. This suggestion ignores the difference between a gift taxable as such and the receipt of income for tax purposes. A gift tax is imposed not upon property but upon its transfer, while an income tax is imposed upon income at the time of its realization. To hold as we have that petitioner realized

income when payments were made to his sons in October is not, as we think, inconsistent with a holding that petitioner made a gift to his sons in the previous February when the lease was executed.

It is our view that the gift, conceded by all parties to have been made in 1946, was made on February 26, as urged by petitioner. To think otherwise is to ignore the plain, unambiguous terms of the statute, as well as the regulations promulgated in connection therewith. Sec. 1000 (b) of the Internal Revenue Code (26 U. S. C. A. 1946 ed. Sec. 1000 (b)) provides for the imposition of a gift tax upon the transfer of property whether "the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible." Regulation 108, Sec. 86.2 (a) in effect repeats the statutory definition and states:

> "Inasmuch as the tax also applies to gifts indirectly made, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax."

We think it is hardly open to dispute but that petitioner's sons as donees at the time of the execution of the lease and assignments acquired a property right, that is, a right to receive income, a right to participate in the rental proceeds. The manner of the enforcement of that right or what it might mean to the donees in the future is of no consequence. As was stated in *Harris* v. *Commissioner*, 340 U. S. 106, 111:

> "We, however, think that the gift tax statute is concerned with the source of rights, not with the manner in which rights at some distant time may be enforced. Remedies for enforcement will vary from state to state. It is 'the transfer' of the property with which the gift tax statute is concerned, not the sanctions which the law supplies to enforce transfers."

It is true, we think, that the value of the gift as represented by the assignment which petitioner made to his sons was speculative, uncertain and contingent upon future developments. This was recognized by petitioner in his letter to his sons which accompanied the assignments, in which it was stated:

> "The value of this gift to you is to say the least questionable. The amounts, if any, that you may receive are purely speculative and contingent on so many factors, that it would be folly to place any worth on it."

Even so, this is an immaterial factor in determining whether a gift was made at that time. As was stated in *Smith* v. *Shaughnessy,* 318 U. S. 176, 180:

> "Even though these concepts of property and value may be slippery and elusive they can not escape taxation so long as they are used in the world of business. The language of the gift tax statute, 'property . . . real or personal, tangible or intangible,' is broad enough to include property, however conceptual or contingent."

In response to a contention that a gift tax could not be imposed in the absence of an ascertainable donee, the court in *Robinette* v. *Helvering,* 318 U. S. 184, 186, stated:

> "The gift tax law itself has no such qualifications. It imposes a tax 'upon the transfer . . . of property by gift.' And Treasury Regulations 79, Art. 3, provide that 'The tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.' "

See also *Commissioner* v. *Berger,* 201 F. 2d 171, 173.

Returning to *Helvering* v. *Horst* (311 U. S. 112), while the sole question decided was that the money received by the son from collection of the interest coupons was income chargeable to the father, the court recognizes that a gift was previously made and at the time when the coupons were delivered to the son. While the question was not before the court, it appears hardly open to doubt but that the father would have been subject to a gift tax upon the transfer or delivery of the coupons and that the value upon which the tax could have been imposed was that at the time of delivery rather than at the time of maturity when the son collected the coupons. Obviously, of course, the value of the gift in that case was more readily ascertainable than

in the present case, but the fact that the value of the gift is difficult of ascertainment is not material, as we have shown.

Holding as we do that the gift in controversy was made by petitioner to his sons on February 26, 1946, there remains the question as to whether the proceeding should be remanded to the Tax Court for the purpose of finding its value. Ordinarily we would be disposed to so do in order that the Commissioner might have an opportunity to offer proof as to the value of the gift when made. However, this is not an ordinary situation. Petitioner by expert witnesses proved that the value of the gift when made was $34,090. Respondent had an opportunity but refused to offer evidence on this issue. Instead, he deliberately shifted his position for the purpose stated in his brief, "in order to protect the revenue." In view of our conclusion, it is evident that the Commissioner mounted a horse headed in the wrong direction. Such being the case, it is not discernible why petitioner should be put to the expense and vexation of another hearing on an issue which he sought to maintain and upon which he offered proof. The uncontroverted evidence is that the value of the gift when made was $34,090, which we under the circumstances accept as its value.

The decision of the Tax Court as to the deficiency in petitioner's income tax for the year 1946 is affirmed. The decision of the Tax Court as to the deficiency in petitioner's gift tax for the year 1946 is reversed and remanded, with directions that the deficiency in that respect be redetermined on the basis of this decision. Affirmed in part, reversed in part.

APPENDIX B

Judgment Below

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Wednesday, June 23, 1954.

Before

HON. J. EARL MAJOR, *Chief Judge*
HON. F. RYAN DUFFY, *Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 10987, ARTHUR T. GALT, *Petitioner,*
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

No. 11001, COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*
vs.
ARTHUR T. GALT, *Respondent.*

Petitions for Review of a Decision of The Tax Court of the United States.

This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the decision of the Tax Court of the United States entered in this cause on May 22, 1953, be, and the same is hereby, Affirmed as to the deficiency in the taxpayer's Income Tax for the year 1946. It is further ordered and adjudged by this Court that the Decision of the said Tax Court as to the deficiency in the taxpayer's Gift Tax for the year 1946 be, and the same is hereby, REVERSED, and that this cause be, and the same is hereby, REMANDED to the said Tax Court of the United States with directions that the deficiency in that respect be redetermined on the basis of the decision of this Court filed this day.

APPENDIX C

Order Denying Rehearing

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Tuesday, October 11, 1954.

Before

HON. F. RYAN DUFFY, *Chief Judge*
HON. J. EARL MAJOR, *Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 10987, ARTHUR T. GALT, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

No. 11001, COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

vs.

ARTHUR T. GALT, *Respondent.*

Petitions for Review of a Decision of The Tax Court of the United States.

It is ordered by the Court that the Petition for a Rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX D

Statutes and Regulations Involved

1. INTERNAL REVENUE CODE OF 1939.

Sec. 22 Gross income

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly. In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income.

* * * *

Chapter 4—Gift Tax

Sec. 1000. Imposition of tax

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. Gift taxes for the calendar years 1932-1939, inclusive, shall not be affected by the provisions of this chapter, but shall remain subject to the applicable provisions of the Revenue Act of 1932, except as such provisions are modified by legislation enacted subsequent to the Revenue Act of 1932.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect,

and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.*

2. Treasury Regulations.

Reg. 108, Sec. 86.2(a).

Transfer reached.—(a) *In general.*—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. Thus, for example, a taxable transfer may be effected by the declaration of a trust, the forgiving of a debt, the assignment of a judgment, the assignment of the benefits of a contract of insurance, or the transfer of cash, certificates of deposit, or Federal, State, or municipal bonds. Various statutory provisions, which exempt bonds, notes, bills and certificates of the indebtedness of the Federal Government or its agencies and the interest thereon from taxation, are not applicable to the gift tax since this tax is an excise tax on the transfer, and is not a tax on the subject of the gift. However, a gift of a bond, note, or certificate of indebtedness issued by the Federal Government prior to March 1, 1941, if made by a nonresident alien not engaged in business in the United States, is not subject to the tax; but a gift by any such nonresident alien of an obligation of the Federal Government issued on or after March 1, 1941, is subject to the tax. Inasmuch as the tax also applies to gifts indirectly made all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. * * * *

3. Illinois Statutes.

(a) Illinois Revised Statutes, 1953, Chapter 30, Section 2, provides:

> Every estate, feoffment, gift, grant, deed, mortgage, lease, release, or confirmation of lands, tenements, rents, services or hereditaments made or had,

* As in force in 1946; 1951 amendment, which added a sentence not here material, has not been included.

or hereafter to be made or had, by any person or persons, being of full age, sound mind, dis-covert, and not procured by duress, to any person or persons, and all recoveries, judgments and executions had or made, or to be had or made, shall be good and effectual to him, her or them to whom it is or shall be so made, had or given, and to all others, to his, her or their use, against the judgment debtor, sellor, feoffer, donor, grantor, mortgagor, lessor, releasor, or confirmor, and against his, her or their heirs, claiming the same only as heir or heirs, and every of them, and against all others having or claiming any title or interest in the same, only to the use of the same judgment debtor, sellor, feoffer, donor, grantor, mortgagor, lessor, releasor or confirmor, or his, her or their said heirs, at the time of the judgment, execution, bargain, sale mortgage, covenant, lease, release, gift or grant made.

(b) Illinois Revised Statutes, 1953, Chapter 80, Section 14, provides:

The grantees of any demised lands, tenements, rents or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee or assignee, shall have the same remedies by entry action or otherwise, for the non-performance of any agreement in the lease, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor might have had if such reversion had remained in such lessor or grantor.

APPENDIX E

Concordance Between 1939 and 1954 Internal Revenue Codes

A. The Applicable Income Tax Provisions

1. Section 61(a) of the Internal Revenue Code of 1954 provides:

§61. Gross income defined

(a) General definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

2. The only change made while this provision was passing through Congress was the insertion of the word "gross" in clause 13, "in order", as stated by the Senate Committee (Sen. Rep. No. 1622, 83rd Cong., 2d sess., p. 168), "to conform that section [§61(a)] with section 702(c), which provides that in any case where it is necessary to determine the gross income of a partner, such amount shall include

his distributive share of the gross income of the partnership."

3. It is clear from both Committee Reports (H. R. Rep. No. 1337, pp. A18-A19; Sen. Rep. No. 1622, pp. 168-169, both 83rd Cong., 2d sess.), that Section 61(a) of the 1954 Code was intended to correspond to Section 22(a) of the 1939 Code (*supra*, p. 35):

"§61. Gross income defined

"This section corresponds to section 22(a) of the 1939 Code. While the language in existing section 22(a) has been simplified, the all-inclusive nature of statutory gross income has not been affected thereby. Section 61(a) is as broad in scope as section 22(a).

"Section 61(a) provides that gross income includes 'all income from whatever source derived.' This definition is based upon the 16th Amendment and the word 'income' is used* in its constitutional sense. Therefore, although the section 22(a) phrase 'in whatever form paid' has been eliminated, statutory gross income will continue to include income realized in any form. Likewise, no change is effected by the elimination of the specific reference to compensation of the President and judges of courts of the United States, and the compensation of such individuals will continue to be taxed in the same manner as that of other taxpayers. In view of the fact that certain types of income are excluded from gross income by other sections of the income tax subtitle of the new code, section 61(a) contains a clause excepting such income from the general definition of gross income.

"After the general definition there has been included, for purposes of illustration, an enumeration of 15 of the more common items constituting gross income. It is made clear, however, that gross income is not limited to those items enumerated. Thus, an item not named specifically in paragraphs (1) through (15) of section 61(a) will nevertheless constitute gross income if it falls within the general definition in section 61(a)."

---

* The Senate Report inserts at this point the words "as in section 22(a)."

B. The Applicable Gift Tax Provisions

1. (a) Section 2501(a) of the Internal Revenue Code of 1954 provides:

§2501. Imposition of tax

(a) General rule.—For the calendar year 1955 and each calendar year thereafter a tax, computed as provided in section 2502, is hereby imposed on the transfer of property by gift during such calendar year by any individual, resident or nonresident, except transfers of intangible property by a nonresident who is not a citizen of the United States and who was not engaged in business in the United States during such calendar year.

(b) Section 2511(a) of the Internal Revenue Code of 1954 provides:

§2511. Transfers in general

(a) Scope.—Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

2. (a) The only change made in Sec. 2501 while the Code was being enacted was purely formal; it was renumbered as subsection (a) by the Senate, and the cross-reference now constituting Sec. 2501(b) was added (Sen. Rep. No. 1622, 83rd Cong., 2d sess., p. 478) in order "to more clearly indicate that the gift tax does not apply to transfers by nonresidents not citizens of the United States of property situated outside the United States at the time of the gift."

(b) No changes were made in Sec. 2511 (Sen. Rep. No. 1622, 83rd Cong., 2d sess., p. 479).

3. Both Committee reports show that, so far as here material, the new Code reenacts the old.

(a) Reference Sec. 2501(a), see H. R. Rep. No. 1337, p. A321; Sen. Rep. No. 1622, p. 478, both 83rd Cong., 2d sess.:

"§2501. Imposition of tax

"This section imposes the gift tax for the calendar year 1955 and subsequent calendar years, replacing section 1000 (a) of the 1939 Code. Under existing law the tax is imposed on the transfer of property by gift by any individual, resident or nonresident; but, in the case of a nonresident not a citizen of the United States, its application is limited to property situated within the United States by section 1000(b). This section differs from existing law in that it will exempt from the tax a transfer of intangible property (such as stocks and bonds) made by a nonresident who is not a citizen of the United States and who was not engaged in business in the United States during the calendar year in which the transfer was made."

(b) Reference Sec. 2511, see H. R. Rep. No. 1337, p. A322; Sen. Rep. No. 1622, p. 479, both 83rd Cong., 2d sess., as follows:

"§2511. Transfers in general

"Subsection (a) of this section, except for clerical changes, corresponds with section 1000(b) of the 1939 Code.

"Under present law, in the case of a nonresident not a citizen of the United States, stock of a corporation is treated as having a situs in the United States either if the corporation is incorporated in the United States, or if the stock certificate is physically located here. Under subsection (b) of this section, such stock will have a situs in the United States only if the corporation is incorporated here."

C. SUMMARY.

The foregoing amply documents the statements in the text (pp. 13, 15-16, *supra*), that the enactment of the 1954 Internal Revenue Code has not effected any changes of substance in the statutory provisions involved in this case insofar as they are material and relevant here.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 524

ARTHUR T. GALT, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 307-334) are reported at 19 T.C. 892. The opinion of the Court of Appeals (Pet. 17-32) is reported at 216 F. 2d 41.

JURISDICTION

The judgment of the Court of Appeals (Pet. 33) was entered on June 23, 1954. A petition for rehearing was denied on October 11, 1954 (Pet. 34). The petition for a writ of certiorari was filed on

January 8, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254.

QUESTION PRESENTED

The taxpayer, who individually owned certain real property, in 1946 made a 20-year lease to the operators of a race track, with a provision, among others, that the portion of annual rentals to be determined upon a percentage of wagering should be paid 40% to himself and 20% to each of his three sons—the fixed annual rental being payable entirely to himself. By letter, on the day the lease was executed, he gave to each son a 20% interest in the percentage-of-wagering rentals.

The question presented is whether the Court of Appeals was correct in affirming the decision of the Tax Court that the portion of rentals based on the percentage of wagering for 1946 paid to the sons was taxable as income to the taxpayer.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) [as amended by Sec. 1, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever

kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

STATEMENT

Insofar as material to the issue presented here, the facts, as found by the Tax Court (R. 308-320) and as stated by the court below in its opinion (Pet. 17-21), may be summarized as follows:

The taxpayer, for some 20 years prior to 1946, had owned, individually, certain realty (referred to as the "Fair Grounds" property) near Chicago, Illinois, on which a spectators' grandstand and a track for harness races had been constructed. (R. 308; Pet. 18.)

On February 26, 1946, the taxpayer, as lessor, entered into a 20-year lease of that property with Maywood Park Trotting Association, Inc. Under the lease,[1] the taxpayer as "Lessor" leased the

[1] The material portions of the lease—which was contained in full in the record, pp. 10-27—were quoted by the Tax Court in its findings. (R. 309-314.)

property to Maywood Park from 1946 through 1965, for the purpose of operating a harness racing track. The lessee, under Section 1 of the lease, agreed to pay a "guaranteed fixed rental" of $35,000 annually, and by Section 2 agreed "to pay the Lessor" a specified percentage (graduated) of the total amount wagered at the track annually. (R. 309-310.) Section 4 of the lease provided further that "any sums that may be due" under Section 2 "shall be paid as follows" (R. 310):

> 40% to Arthur T. Galt, Lessor
> 20% to Arthur T. Galt, Jr.
> 20% to Raymond M. Galt
> 20% to William C. Galt

The lease continued with a provision that (R. 310-311):

> The above persons designated to receive 20% each are sons of the Lessor who have irrevocably been given said interests by the Lessor, Arthur T. Galt, and any sums due them hereunder shall be paid to them by mailing the amount so due to their respective residences.

The lease contained a provision (Section 6) requiring the lessee to pay taxes, but specifying that 50% of amounts so paid should be deducted from the amount due under the percentage clause. Further, the lease provided (Section 9) that all improvements, betterments, etc., at the termination of the lease should "belong to the Lessor". Also,

the lease contained (Section 26) detailed provisions giving the "Lessor" all rights to reenter and to take the property, free from any claim under the lease, in the event of the happening of any of a number of specified conditions, developments, or defaults by the lessee. (R. 311-312.)

The lease imposed a number of specified conditions and requirements upon the lessee, and reserved to the lessor "numerous other rights and powers". It provided (Section 42) that the lessee was entitled "to regard Arthur T. Galt [the taxpayer] alone as Lessor for all purposes", and that the taxpayer "shall have full power to take all action required under this lease, receive notices, give any approvals and make amendments hereto without the participation" of his wife or sons. (R. 313.)

On the date on which he executed the lease, the taxpayer wrote a letter (R. 313-314) to each of his three sons, in which he told of his having entered into the lease and stated that he wanted each to have "a part of the proceeds, if any there shall be, from the wagering", and stated "I therefore give you each a one-fifth (1/5) interest under the contingent percentage clause". The letter contained recitals to the effect that the gift was "absolute and irrevocable", that the taxpayer had provided in the lease for payment directly to each son by the lessee, and that the taxpayer was divesting himself "of any control or dominion" over the amounts which might become due under the percentage clause to the extent of the gift.

During 1946, the total amount wagered at Maywood Park was some $5,885,000, and the net amount due as rent for that year under the percentage clause of the lease (Section 2) was $39,873.05—as computed after appropriate credits under the lease. Maywood Park paid 20% ($7,974.61) of this sum to each of the taxpayer's three sons and 40% to the taxpayer, in addition to the $35,000 guaranteed rental paid to the taxpayer. The payments to the sons were made by check to each, a letter accompanying each check stating that the money thus paid "is your share under the terms of the lease". The checks were endorsed by the sons, and deposited in their respective bank accounts. The taxpayer did not exercise any control over the money thus received by the sons. (R. 314-315.)

None of the sons owned any part of the Fair Grounds property—which the taxpayer continued to own after, as he had before, the lease was executed—or had anything to do with negotiating the lease, the first time they became aware of the lease being when they received the letter from the taxpayer. After the execution of the lease, Maywood Park dealt with the taxpayer, and not the sons, in connection with matters pertaining to the lease. Aside from receiving the portion of rents transferred to them, the sons did not exercise any of the rights and powers reserved to the lessor under the lease, those rights and powers being retained by the taxpayer and exercised only by him, or his agents, to the extent they were exercised at all. (R. 315.)

Each of the sons reported the $7,974.61 received under the lease in his income tax return for 1946, while the taxpayer reported no part of the amounts received by the sons but reported only, as rental income received from Maywood Park in 1946, the amount of $50,949.22 (the total of the $35,000 guaranteed rental plus 40% of the percentage rental, $15,949.22). The Commissioner determined an income tax deficiency against the taxpayer for 1946, which resulted in part from including in the taxpayer's income the aggregate, $23,923.83, received by the sons in that year as rental from Maywood Park. (R. 315-316.)

The Tax Court sustained the Commissioner on this issue (R. 321-328), and the Court of Appeals affirmed (Pet. 23-27).[2]

ARGUMENT

The court below was clearly correct in affirming the Tax Court's conclusion that the taxpayer must be regarded for income tax purposes as the real owner of the portion of the rentals under the lease paid to the sons, and that therefore those rentals were taxable to him. In affirming that conclusion, the court properly followed the settled principle

[2] The Commissioner had also determined (R. 320) a deficiency in gift tax against the taxpayer for 1946, which the Tax Court had—in accordance with the view it had taken in the light of the final position before it of the parties—sustained only in part (R. 328-329). On review (where the gift tax case and the income tax case were consolidated, as they had been before the Tax Court), the court below further resolved the gift tax question in the taxpayer's favor (Pet. 27-32), and no review is sought here (Pet. 2) with respect thereto.

that income must be taxed to its real owner, the person who earns it or produces it, or who owns the property producing it, notwithstanding ingenious or skillful devices to "give it away" or cause it to go to others. *Lucas* v. *Earl*, 281 U.S. 111; *Higgins* v. *Smith*, 308 U.S. 473; *Helvering* v. *Clifford*, 309 U.S. 331; *Helvering* v. *Horst*, 311 U.S. 112; *Harrison* v. *Schaffner*, 312 U.S. 579; *Commissioner* v. *Sunnen*, 333 U.S. 591; *Commissioner* v. *Culbertson*, 337 U.S. 733. Thus, the case involves merely the application of well established law to the particular facts here, and presents no occasion for further review by this Court.

As the court below stated (Pet. 24), the property which produced the income—"the tree which produced the fruit"—was owned by the taxpayer "after the execution of the lease as it had been before," and the lease "merely evidenced the manner in which the fruit from the tree should be distributed". This is the decisive point. The taxpayer errs in his claim that "there was a gift of income producing property" (Pet. 9), or, in a mistaken variant of the analogy familiar to this context, that there was a gift of a branch of the tree on which the money in issue grew which should exempt the taxpayer from "income tax on the fruit which grows on that branch." (Pet. 8-9, 15.) The sons received nothing more than an anticipatory assignment of income from taxpayer's leased property—precisely the kind of diversion the cases cited above have held unavailing to avoid

taxation of income to the one whose effort or property produces it.

Nor is there merit in the assertion (Pet. 8-9, 15) that the decision below is "self-contradictory" in holding that the assignment of income was a taxable gift while holding that the income thereafter paid to the sons remained taxable to the taxpayer. There is, of course, nothing inconsistent in the payment of a tax on income which is then used to make a taxable gift. Because the identical realities are present, the same tax consequences follow where the gift is made in advance, eliminating the mechanics of transfer through the taxpayer's hands. Insofar as the decision below favors the taxpayer by treating the assignment as a single gift, valued at what appears to be only a fraction of its ultimate worth, this obviously gives him no cause for complaint. And it cannot serve to alter the dispositive fact that the income paid to the sons in October, 1946, was simply channeled to them by the gift of February, 1946, and was properly taxed to the owner of the property which produced it, the taxpayer here.

Both the Tax Court (R. 322-326) and the court below (Pet. 26-27) correctly rejected the argument, urged again here (Pet. 10-11), that this case is ruled in taxpayer's favor by *Blair* v. *Commissioner,* 300 U.S. 5. Although it may be said, as the taxpayer asserts (Pet. 10), that in both *Blair* and this case only a "right to receive income" was assigned, this superficial similarity is insignificant. For, as this Court later pointed out in *Helvering* v. *Horst,* 311 U.S. 112, 118, the right assigned in *Blair* "was

thought to be so identified with the equitable ownership of the property, from which alone the beneficiary derived his right to receive the income and his power to command disposition of it, that a gift of the income by the beneficiary became effective only as a gift of his ownership of the property producing it." Here, there is no comparable identity between the income anticipatorily assigned and the property producing that income. The taxpayer remained the owner of that property, retaining as lessor the complex of rights, powers, and privileges specified by the lease. See pp. 4-5, 6, *supra*. He transferred only a share of the income, his income, a step which could not serve to transfer his tax liability.

A similar answer refutes the assertion (Pet. 12-13) that there is a conflict here with the decisions in *Hawaiian Trust Co.* v. *Kanne*, 172 F. 2d 74 (C.A. 9th), or *Farkas* v. *Commissioner*, 170 F. 2d 201 (C. A. 5th). Both of those cases were adequately distinguished by the court below (Pet. 27)—

> on the ground that here there was no assignment of an interest in the property which produced the income or in the lease which provided for its distribution but only an assignment of income. In those cases the assignor had nothing left after the assignment; here he had everything except the portion of the income assigned.

CONCLUSION

The decision below is correct. It turns upon the particular facts of the case and presents no question calling for further review by this Court. There is no conflict of decisions. The petition should therefore be denied.

Respectfully submitted,

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FEBRUARY, 1955.

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